United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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74-2580

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P/S

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THEODORE GRIECO, JR.,
Plaintiff-Appellant,

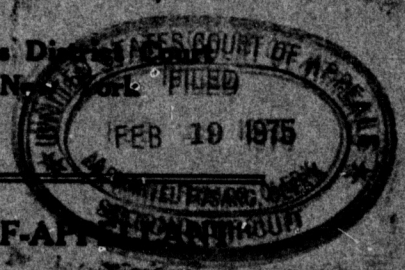
against

MEMORIAL HOSPITAL OF GREENE COUNTY,
FRANCIS FUGARO,
Defendants-Appellees,

and

PAUL M. SNAPPER,
Defendant.

On Appeal from the United States District Court
for the Southern District of New York



REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Defendants, at pages 3-4 of their brief, rely heavily upon an allegation contained in the affidavit of defendant Dr. Francis Fugaro that by virtue of a resolution dated February 16, 1931, reproduced at pages 43a-44a of the appendix, Memorial Hospital became an agency or department of the County Government.

Certainly, defendant Fugaro's assertion is wholly conclusory and, therefore, absolutely worthless as an affidavit of relevant facts. Moreover, such a bold allegation which so improperly usurps the role of the fact-finders to determine this issue, ignores the conceded fact that within the four corners of that very resolution, there is specifically set forth the exemption granted to the County from "appropriat[ing] any funds either for the erection, equipment and maintenance" of the hospital (44a). That responsibility, defendants conveniently overlook, was to fully remain with the private membership corporation, in particular view of the further official resolution of December 29, 1931 (50a-53a), which expressly provided that Memorial Hospital was to "be established, erected, maintained and operated under and pursuant to the terms and conditions of" the contract already discussed at great length by plaintiff in his primary brief.

In essence, defendant Fugaro's conclusions of law contradict the terms of that written agreement, which is consistently evaded by defendants. But that document and the corporate credentials filed and fully in force for the purpose of enabling Memorial Hospital of Greene County Inc. to implement the contractual duties delegated to that corporation, stand far above defendants' factually void and specious position that the corporation is nothing more than an inert entity.

Such documents, furthermore, completely contradict some other random allegations contained in defendants' affidavits below.

At page 4 of defendants' brief, they allude to defendant Fugaro's allegations that he "has been advised" that hospital managers are appointed by Greene County and that hospital employees are paid from operating income turned over to the Treasurer of Greene County (39a).

The source of defendant Fugaro's advice, from which these entirely self-serving conclusions are drawn, is not revealed. But more importantly, such allegations are drowned out by the exactly contrary provisions written into the governing agreement between the corporation and the County of Greene. Pursuant to the contractual commands, the majority of hospital managers—indeed the longest term appointees—are not County officials at all, as plaintiff has already pointed out in his primary brief, but rather, corporate directors of the private and completely non-governmental corporation known as Memorial Hospital of Greene County, Inc. This corporation alone bears the additional responsibility of furnishing any operating funds required by the hospital to meet its payrolls and other expenses.

Defendant Fugaro is merely a medical employee of the hospital, who is hardly suited to acquaint this Court with any of the facts respecting the interlocking relationship between the County and the corporation. He is not at all authorized by law to take and keep for himself a jury panel's province to resolve the ultimate factual issues on this score. Moreover, it is clear that defendant Fugaro has either been misadvised or is altogether mistaken in venturing into areas of hospital operation which are covered expressly in a contract which belies his gratuitous utterances made to shield himself and his employer from a serious suit at law. In this very connection, affiant Clark, in casually suggesting that

the primary function of Memorial Hospital of Greene County, Inc. "has been from time to time to solicit funds which it turned over to the hospital" (59a), actually emasculates by false averment the crucial funding obligations of the corporation, resulting in the County's complete relief from any fiscal responsibilities whatever respecting the operation and management of Memorial Hospital. His further allegation (57a), that hospital employees are paid by the County studiously avoids confrontation with the conceded fact, as stated above, that the corporation, *not the County at all,* is responsible for providing such monies in the first place and seeing that any deficit over and above regular patient income is thereby met with purely private funds. The County has no responsibility in all of this and Clark's unsupported suggestion, by way of misleading innuendo, that the County is the ultimate financier is not true at all.

Aside from this, it is interesting the way both Clark and Fugaro steer clear of such critical questions as how the hospital is run, which entity promulgates rules and regulations for its functioning, which one hires and supervises its personnel, how governing policy is formulated—in short the true and complete extent of the interlocking relationship which Judge Pollack—on this barren state of the record—has ruled as irrelevant completely.

Under all of the circumstances disclosed by the evidence thus far shown, there can be no justification for summary dismissal of the complaint, denying to plaintiff his absolute right to a trial of these issues. Under long-settled principles of law, such questions are clearly factual—hinging as they do upon all of the proof to be adduced respecting the true and actual relationship of the contracting parties. This

is a complex question, which involves the complete details as to the management, operation, maintenance and control of the facilities of a hospital named for and after Memorial Hospital of Greene County, Inc. The resolution of such matters is inherently unsuited to a motion proceeding, especially one predicated upon hazy, evasive, sparse, incomplete and contradictory allegations by those interested persons whose knowledge of the facts is—at the moment—exclusive as well as beyond the reach of the cross-examiner.

As the Court held in *Morton L. Ackerman, Inc.* v. *Mohawk Co.*, 37 A.D. 2d 655, 322 N.Y.S. 2d 396, reversing summary judgment which was erroneously granted below:

> "Where the intent of the parties is not unequivocally clear, we must glean intent from the sense in which the words were used, the relation of the parties, the resolution of conflicting inferences, if any, and other surrounding circumstances. This inquiry involves both questions of law and fact * * * and is not properly dealt with by summary judgment."

See, to the same effect: *Berg* v. *Auto Wheel Industries, Inc.*, 32 A.D. 2d 876, 301 N.Y.S. 2d 650.

As succinctly announced in *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N.Y. 50, 55:

> "The fundamental rule in the construction of all agreements is to ascertain the substantial intent of the parties. The purpose to be accomplished and the object to be advanced may be considered and may, if necessary, be shown by parol evidence * * *."

The same Court, in *Rosen* v. *Equitable Paper Bag Co.*, 286 N.Y. 410, similarly condemned any concept that such

matters may be resolved summarily, without a trial of the evidence. Confronted in that case with the effect of a written agreement, the Court held (286 N.Y. at 417): "[T]he trial judge erred in giving to the instrument a [certain] construction as matter of law. * * * It seems clear to us that upon that point the record presents a question of fact * * *."

Quite recently, the same high Court likewise corrected the erroneous failure to submit to the fact-finders an issue extremely close to that at bar. In *Pantori* v. *Welsbach Corp.*, 43 A.D. 2d 517, 348 N.Y.S. 2d 767, mod. 34 N.Y. 2d 812, the question was whether under an agreement, defendant might be charged with the supervisory duties of general contractor. The Appellate Division determined the issue, against the plaintiff, as one of law. On further appeal, the Court of Appeals wrote: "At the trial a factual question arose as to whether the defendant * * * was * * * performing the supervisory functions of a general contractor. The * * * Court should have submitted this issue to the jury."

Pantori is illustrative of the guiding principle—equally applicable here—set forth in *Mendex, Inc.* v. *Cisatlantic Corp.*, 98 N.Y.S. 2d 269, 271, affd. 277 App. Div. 1113, 10 N.Y.S. 2d 736:

> "[W]hen the sense in which the words of a written instrument are used * * * is determinable from the relation of the parties, facts apart from it, and the surrounding circumstances, it must be found and fixed by the jury."

As to the agreement involved in *Pioneer Credit Corp.* v. *San Miguel*, 275 App. Div. 636, 92 N.Y.S. 2d 328, 330, the Court held that "[i]n a case such as the one before us, the

triers of the facts are permitted to fix the sense in which the words were used and in so doing could properly consider the relation of the parties, the surrounding circumstances and the inferences that might be drawn from undisputed facts'' (see also *Phair* v. *Figueiredo,* 285 App. Div. 451, 137 N.Y.S. 2d 465).

In light of all of the above and the points discussed in plaintiff's initial brief to this Court, we are at a loss to understand Judge Pollack's stated reliance on the opinion in *Pope* v. *Memorial Hospital,* as containing ''reason[ing] well expressed'' (86a), when the basis for the dismissal in *Pope* was Judge MacMahon's erroneous finding that the corporation had dissolved. While defendants herein say—as they must—that this improper determination in *Pope* as to corporate dissolution was a mere footnote reference (defendants' brief, p. 6), that key footnote is as lengthy as the entire text of the opinion itself and is referred to in the only sentence of the opinion which sets forth the reasoning of the Court. Even in that single sentence, in which the mistaken reference to corporate dissolution is set forth, Judge MacMahon states that ''the matter is not free from confusion'' (78a). What would the ruling have been if the correct status of the corporation had been given? Hardly would it have been the bestowal upon defendants of any such thing as summary judgment of dismissal, yet we are here to protest against that very resolution in the instant case.

We are dealing in the present action with a hospital which bears and functions under the exact name of the private corporation which has financed it from its inception

and which has staffed its managers from its beginnings with corporate personnel, under a binding contractual commitment. Defendants do not deny any of these facts; rather, they elect to remain notably silent on them as they did below, resting their appellate rights upon the purported strength of their horrendously incomplete, altogether foggy presentation to Judge Pollack respecting the day-to-day operations of Memorial Hospital of Greene County. Such evasion of the facts by those interested witnesses in exclusive possession of them, yields up the strongest inferences against defendants. Summary judgment of dismissal *in their favor,* under such circumstances, is the very last type of relief to which they are entitled.

Conclusion

The order appealed from should be reversed and defendants' motions for dismissal of plaintiff's complaint should be denied.

Respectfully submitted,

GAIR, GAIR & CONASON
Attorneys for Plaintiff-Appellant

HERMAN SCHMERTZ
Of Counsel

Affidavit of Service by Mail

In re:
Theodore Grieco, Jr., v. Memorial Hospital of Greene County, Francis Fugaro and Paul M. Snapper

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on FEB 19 1975, 197..., he served 3 copies of the within Reply Brief in the above named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Maynard, O'Connor & Smith, Esqs.
Attorneys for Defendants-Appellees
Barclay Heights
Route 9-W
Saugerties, New York 12477

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 19th day of Feb. 1975

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1975